deducted by it before the payment was made.

I fail to see how that could amount to an advance assessment. The provision in the Act for advance assessments is section 92 which deals with the circumstances in which the Director General may make what is known as an advance assessment. And an advance assessment has to be made in the manner prescribed by section 93. Section 107A has no reference to any of the circumstances dealt with by section 92. Section 107A is within Part VII of the Act which deals with Collection and Recovery of Tax. Section 107A provides a method of collection of tax which may or may not have been assessed. The Special Commissioners do not have jurisdiction to entertain any appeal or complaint in respect of matters or questions that arise from or in respect of the collection and recovery of tax.

In my judgment the relief sought by the plaintiffs by the Originating Summons is properly before this Court. The application, enclosure (5), is dismissed with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok.*

BALASUBRAMANIAM v. VENKITASAN

[O.C.J. (Shankar J.) January 15, 1985]

[Johor Bahru – Civil Suit No. 194 of 1973]

Contract – Sale of land – Wilful breach by vendor – Measure of damages – Whether on value of land at date of judgment or breach – Interest – Costs – Courts of Judicature Act 1964, s. 16 & Art. 7 of Schedule – Civil Law Act 1956, s. 11 – R.H.C. 1980, O.42, r.12 – Con. tracts Act 1950, s. 74(1).

The sole question for decision in this case is the measure of damages to be awarded to a purchaser arising out of a wilful breach of contract for the sale of land by a vendor, that is whether damages should be assessed based on the value of the land at the date of judgment or at the date on which the breach occurred. The plaintiff contracted in 1969 to purchase a piece of land from the defendant for $2,000. The plaintiff paid $500 on signing the agreement and a further $1,100 on November 4, 1970. These payments were made for a consideration which had wholly failed. On the date of the breach of contract, the land was worth only $1,450.

Held: (1) the market value of the land is to be assessed as on the date on which the breach of contract occurred, following the decision in *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin.*[3] As the land was worth only $1,450 on the date of breach, the plaintiff did not suffer any damages by way of loss of bargain;

(2) the defendant should pay the plaintiff the sum of $1,600;

(3) the defendant should pay interest on $500 from December 26, 1969 to November 4, 1970 and on $1,600 from November 4, 1970 to January 15, 1985 (date of judgment) at 8% per annum and the plaintiff (following agreement on the 70% formula) should receive 70% of this amount in satisfaction of his pre-judgment interest. From judgment till realization interest will run on $1,600 at 8% per annum;

(4) $1,800 fixed by the court as costs in the exercise of its discretion to be paid by the defendant to the plaintiff.

Cases referred to:

(1) *Engell* v. *Fitch* (1869) L.R. 4 Q.B. 659.
(2) *Diamond* v. *Campbell-Jones* [1961] Ch. 22.
(3) *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin* [1967] 2 M.L.J. 174.
(4) *Rosenthal* v. *Alderton* [1946] K.B. 374.
(5) *Vyramuttu* v. *State of Pahang* (1924) 4 F.M.S.L.R. 277.
(6) *Noordin bin Mat Dom* v. *Yahaya bin Mohamed Jalit* [1952] M.L.J. 17.
(7) *Tara Rajaratnam* v. *Datuk Jagindar Singh, Datuk Suppiah and Arul Chandran* [1983] 2 M.L.J. 127.

CIVIL SUIT.

Subra Naicker for the plaintiff.
C. K. G. Pillay for the defendant.

Cur. Adv. Vult.

Shankar J.: The sole question with which this judgment is concerned is the measure of damages to be awarded to a purchaser arising out of a wilful breach of contract for the sale of land by a vendor. Counsel for the plaintiff contends that these damages should be assessed based on the value of the land at the date of the judgment. Defence counsel however submits that the crucial date for this exercise is the date on which the breach occurred.

The facts in so far as they are relevant are as follows. On December 26, 1969 the plaintiff, who is hereafter referred to as the purchaser, entered into an agreement in writing to buy from the defendant, hereafter referred to as the vendor, a piece of land held under Q.T. 65 for Lot No. MLO 2104 containing an area of 1 acre 1 rood and 16 poles situate in the Mukim of Sedenak, District of Kulai, State of Johore for the sum of $2,000. The land is hereafter referred to as the said land.

The purchase price was to be paid in instalments and completion was to take place on or about November 30, 1970. It did not take place on that day. Each party has got its own story to tell as to why this happened but for the purposes of the present exercise I must assume that the vendor admits that he was in breach of contract as on November 30, 1970. The heat generated by the differences between the parties at that time was such as to convince the plaintiff that it was in his best interests to vacate the said land on or about that day, and he did so.

The subsequent correspondence initiated by the purchaser through his solicitor did not produce any effect and on September 8, 1973 the purchaser filed this action. For a variety of reasons which need not detain us here the matter did not come on for hearing until October 30, 1983. Thereafter the parties called their respective witnesses and before the conclusion of the hearing it was agreed between the parties that there be no contest on the issue of liability and that the Court assess damages on the basis that liability was settled. The plaintiff expressly agreed to accept 70% of whatever damages the Court assessed, in full settlement of the claim, but exclusive of costs to be taxed and paid.

The only evidence relevant to this issue is that given by P.W.2 Mohamed Kepol bin Bidin, a retired appraiser. In a nutshell his evidence was that the value of the said land as at November 30, 1970 was $1,450 only but that the current market value on September 2, 1983 was $29,000. In cross-examination the witness's evidence on the latter figure turned out to be quite shaky. He admitted that the value could fluctuate between $16,000 and $29,000. In the light of my judgment which follows the rest of the evidence which went to the possible value of the land in November 1983 is really irrelevant and need not detain us here.

In his final submission, counsel for the plaintiff argued that a duty to mitigate damages only arose in tort but not in contract and the damages which the plaintiff should be awarded should put him in the same position as he would have been had the land been transferred to him. Therefore it was urged that the Court should give him by way of damages the value of a similar piece of land to-day. Since the plaintiff's valuer had stated in his report that the value of the said land in September 1983 was $29,000 and had gone on to state in his evidence at the trial that it could possibly even be $100,000, the figure that should be awarded by the Court was something between these two amounts. No authority was cited for these propositions.

After judgment was reserved defence counsel brought the attention of the Court to three cases to support the view that damages ought to be assessed as at 1970 when the breach occurred and not as at the date of the Judgment. These cases were *Engell* v. *Fitch,*[1] *Diamond* v. *Campbell-Jones*[2] and *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin.*[3] *Rosenthal* v. *Alderton*[4] was also cited to show that only where a claim is based on detinue or conversion can the plaintiff claim the price at the time of judgment.

The authorities cited in support of this view were *Salmond* on Torts – 17th Edition page 531, section 74 of the Malaysian Contracts Act 1950 (Act 136 Revised 1974), *Vyramuttu* v. *State of Pahang,*[5] *Noordin bin Mat Dom* v. *Yahaya bin Mohamed Jalit*[6] and *Tara Rajaratnam* v. *Datuk Jagindar Singh, Datuk Suppiah and Arul Chandran.*[7] He also sought to immunize the plaintiff from the effect of *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin (supra)* by contending (if I have understood his argument properly) that the decision cannot be reconciled with the clear words of section 74(1) of the Contracts Act which states that the party who suffers by such a breach is entitled to receive compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach.

The point with which we are specifically concerned in the present matter did not arise for decision either in the case of *Vyramuttu (supra)* or *Nordin bin Mat Dom (supra). Tara Rajaratnam's* case *(supra)* was one concerning tort. But the point did arise in *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin (supra)* and in my view that decision is on all fours with the problem with which we are now concerned.

No useful purpose will be served in dealing with that judgment in detail here. Suffice it to refer to the passage appearing at page 177 where the relevant paragraph begins with this statement:–

"The normal measure of damages is the market value of the property at the contractual time for completion less the contract price."

In other words the market value of the property is to be assessed as on the date on which the breach

of contract occurred. The passage just quoted and the discussion which followed is almost on identical lines with the language of *MacGregor* on Damages – 13th Edition paragraph 678 which must be taken, therefore, as having been cited with approval by the Lord Chief Justice Emeritus Tan Sri S.S. Gill as also representing the law in Malaysia on the point. I hold myself bound by that decision and feel compelled to follow it. That there is no doubt that this view is correct is also borne out by the passage in *Pollock & Mulla* on the Indian Contract and Specific Relief Acts 9th Edition at page 567 where the authors state in a commentary to section 73 of the Indian Contract Act that:–

"Where a vendor of land guarantees his title to the purchaser, and the latter is evicted from his holding, he is entitled to recover the value of the land at the date of eviction, and not merely the purchase money paid for it – *Nagardas* v. *Ahmad Khan* (1895) 21 Bom. 175; *Venkataswami* v. *Venkayya* (1953) A.M. 529. In view of this unanimous current of authority the failure of an attempt to dispute it in Sind; *Ram Singh, Kundan Singh* v. *Sajan Damji* (1927) A.S. 120; 101 I.C. 704, was hardly worth recording."

I would also refer to *A:C. Dutt* on the Indian Contract Act 4th Edition at page 676 where the learned author states:–

"The question is how much worse off is the vendor by reason of the loss of the purchase money in consequence of the non-performance of the Contract. In other words, the law in this country differs from the English Law and allows damages the measure of which ordinarily is the difference between the contract price and the market price at the date of breach. The vendors are bound to minimize the loss."

I note that *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin (supra)* has been fully incorporated into The Law of Contract in Malaysia and Singapore – Cases and Commentary – by Visu Sinnadurai.

Applying the law to the facts of this case I obtained the following result. The plaintiff had contracted to buy the said land for $2,000. But on the date of the breach of this contract the land was worth only $1,450. He therefore did not suffer any damages by way of loss of bargain. Nothing therefore falls to be paid to him by way of general damages on the 70% formula which the parties have agreed upon. But the plaintiff did pay $500 upon signing the agreement and a further $1,100 on November 4, 1970. These payments were made for a consideration which had wholly failed and I accordingly ordered that the defendant do pay the plaintiff the sum of $1,600.

Two subsidiary issues now remain. The first is the question of interest. Whilst the defendant has had the use of this money since 1970 the fact is that it is the plaintiff who has had the conduct of this action. The suit was not filed until September 8, 1973 and no serious effort appears to have been made by the various solicitors who acted for the plaintiff from time to time to bring on the case to trial. I would, however, like to hear further arguments as to when interest should properly commence.

The other issue is the question of costs. The amount awarded is within the jurisdiction of the Magistrate's Court and while the plaintiff will have his costs of this action the scale on which such costs should be awarded is also a matter on which further argument is invited.

(Counsel for the parties then addressed the Court on interest and costs).

On the question of interest, Mr. Pillay suggested that interest should run at 6% per annum from the date of the filing of the writ up to realisation since the defendant did not wilfully keep the plaintiff's money. But Mr. Subra Naicker pointed out that section 16 of the Judicature Act and Article 7 of the Schedule empowered the Court to grant interest up to a maximum of 8% per annum on any judgment debt but left the date on which such interest was to commence at large. He also referred to section 11 of the Civil Law Act 1956. This grants power to Courts to award interest on debts and damages at such rate as the Court thinks fit for the whole or any part of the period between the date when the cause of action arose and the date of judgment. Finally, he referred to Order 42 rule 12 of the Rules of the High Court which states that every judgment debt shall carry interest at the rate of 8% per annum or at such other rate not exceeding 8% such interest to be calculated from the date of the judgment until the judgment is satisfied.

Mr. Pillay emphasized that the plaintiff had not acted with due diligence in filing this action or in prosecuting it but the point here is that the defendant has had the use of the plaintiff's money from the date on which it was paid to him and in view of the earlier arrangement between the parties that the plaintiff was to have the benefit of 70% of any award of the Court, I held that the requirements of justice would be satisfied if interest is calculated on $500 from December 26, 1969 to November 4, 1970 and on $1,600 from November 4, 1970

until today at 8% per annum and the plaintiff do receive 70% of this amount in satisfaction of his pre-judgment interest. As from today interest will run on the decretal amount of $1,600 at 8% per annum till realisation. Section 11 of the Civil Law Act does not permit the granting of interest upon interest.

As to costs Mr. Pillay submitted that it should be on the Magistrate's Court's scale since if the plaintiff had made proper enquiries as to the measure of damages which could be awarded he should have been fully cognizant that the matter was within the jurisdiction of the Magistrate's Court. Mr. Subra Naicker, however, pointed out that when this action was filed it included a claim for specific performance which was not within the jurisdiction of the Subordinate Courts. When the case came on for trial a claim for specific performance was included and the arrangement between the parties to accept damages instead was only reached in the course of the action. It seems to me that the proper approach which the Court should take in such matters is not to be influenced merely by the size of the decretal amount but also to look to whether there were good grounds for the action to be filed in the High Court. In this case I think that the plaintiff was justified in filing his action here even though the delay in prosecuting the action calls for considerable criticism.

Happily counsel for both parties agreed to leave it to the Court to fix a lump sum by way of costs of this action and in the exercise of my discretion I order that a sum of $1,800 be paid to the plaintiff in full satisfaction of his party and party costs such sum to include all disbursements and the valuer's fee.

Judgment is therefore granted in favour of the plaintiff accordingly.

Claim allowed.

Solicitors: *Subra Naicker & Co.; C.K.G. Pillay & Co.*

GISELA GERTRUD ABE v. TAN WEE KIAT

[O.C.J. (Siti Norma Yaakob J.) April 29, 1985]

[Kuala Lumpur – Divorce Petition No. 157 of 1977]

Family Law – Maintenance – Application to vary maintenance order – Change in circumstances – Law Reform (Marriage and Divorce) Act, 1976, s. 83.

In this case the petitioner had obtained a divorce in 1979 from the respondent and it was ordered that the respondent should pay a monthly payment of $1,500 to the petitioner as maintenance for herself and the two children of the marriage. At that time the respondent was earning a salary of $5,000 a month. However, between June 1983 to January 1984 he was out of employment. In January 1984 he obtained a temporary appointment at a salary of $3,000 a month. He also had to incur debts to pay the judgment debt to the petitioner. Of his children, the eldest daughter was 22 years old in April 1985 and the youngest daughter would attain 18 years in May 1985. The petitioner was the owner of a house and was the director of her own company. She claimed that she needed $6,500 for the personal expenditure of herself and her two children who are studying in England.

For the period June 6, 1983 until January 6, 1984, when the respondent was not gainfully employed, he was in arrears of seven months' maintenance totalling $10,500. He applied: (1) to vacate the maintenance order made against him on May 4, 1979 for the period June 6, 1983 to January 6, 1984, and (2) to vary the amount of such maintenance order after January 6, 1984.

Held: (1) there had been a material change in the financial standing of the respondent during the period when he was out of a job and this rendered it unjust to expect him to continue to be bound by the maintenance order made against him in 1979. The maintenance order made against him is therefore rescinded for the period June 6, 1983 to January 6, 1984;

(2) the respondent's legal responsibility to maintain the elder of the children ended when she became 18 on December 1980 and that of the younger daughter will end on May 31, 1985 when she, too, will celebrate her eighteen birthday;

(3) from January 1984 until May 31, 1985 the respondent is legally responsible for maintaining only the petitioner and the younger of the two children and having due regard to the respondent's liabilities, his sources of income and the petitioner's financial standing, $800 will not be an unreasonable sum to expect from the respondent by way of maintenance;

(4) on the 2nd daughter attaining her eighteenth birthday this sum of $800 will be further reduced to $400 per month.

CIVIL SUIT.

Kingston T.K. Tan for the respondent/applicant.

S. Sivasubramanian for the petitioner/respondent.

Cur. Adv. Vult.